Supreme Court, U. S.
FILED
MAR 9 1977
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

No. 76-1271

THOMAS WARNER HOOPES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS W. HOOPES
2559 Keddington Lane
Salt Lake City, Utah 84117
Petitioner Pro se

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U.S. Court of Appeals for Tenth Circuit
Decision excerpt A-2

In the

SUPREME COURT OF THE UNITED STATES

No. _____

THOMAS WARNER HOOPES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Decision of the U. S. Court of Appeals for the Tenth Circuit filed December 3, 1976.

DECISION BELOW

On December 3, 1976, the U.S.Court of Appeals for the Tenth Circuit affirmed the lower verdict. No decis-

ion was rendered upon the denial of Petitioner's Petition for Rehearing.

JURISDICTION

The Decision of the U. S. Court of Appeals for the Tenth Circuit was filed December 3, 1976. The Judgment of Wilful Failure To File (7203) rendered in the District Court was affirmed. A timely Petition for Rehearing was denied on February 3 1977; A Motion for Stay of Mandate Pending Application to the Supreme Court for a Writ of Certiorari was filed on February 8 1977. Also, a Notice of Intention to Petition to U.S.Supreme Court for a Writ of Certiorari was filed with this Court. This Petition for Certiorari was filed within the statutory period. This Court has jurisdiction under Title 28, U.S.C. Sec. 1254 (1). Petitioner asserted below and asserts at this point the deprivation of rights secured by the Constitution of the United States, and Garner v. United States U.S. Sup. Ct. No. 74-100, Off. Rpts. Sup. Ct. Vol. 424 U.S. part 3, p. 600-873, 950-979.

QUESTIONS PRESENTED

1. In view of the Defendant having meticulously followed U.S. Supreme Court instructions regarding testing of specific points required in the filling out and filing of Federal Income Tax Forms (1040),

   A. Can the United States of America, U. S.District Court properly charge and him of Wilful Failure to File, U.S.C., Title 26, Section 7203,for the years 1971 and 1972?

   B. Can the District Court IGNORE U. S. Supreme Court rulings and long-settled guidelines in Garner, Sullivan, Kastigar, et al?

   C. Can the Appellate Court IGNORE U.S.Supreme Court rulings and guidelines in Garner?

   D. Can the Internal Revenue Service, its officers and agents, continually IGNORE U.S.Supreme Court rulings and guidelines in Garner?

2. Can Trial Court, himself a party to suits in which the Defendant is an adversary, who demonstrates bias and prejudice against Defendant, objectively rule in the instant case?

3. Can the Court properly convict the Defendant, when his counsel has ineptly, negligently and, apparently systematically disregarded his client's instructions and proper defense?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION, 5th Amendment:

. . . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

Thomas Warner Hoopes, Defendant below, was charged by misdemeanor information in the Central Division of the United States District Court for the District of Utah, the Honorable Judge Willis W. Ritter, presiding, with two counts of Wilful Failure to File Income Tax Returns, contrary to the provisions of Section 7203, Title 26, U.S.C., for the years 1971 and 1972. Following his arraignment, Defendant, on the 13th day of January, 1976, acting Pro se, filed his Motion for disqualification of the Honorable Willis W. Ritter, together with supporting Affidavit and Brief. On the 14th day of January, 1976, the case came on regularly for jury trial, immediately prior to which the Defendant's Motion was denied by the Court. Thereafter, on the 15th day of January, 1976, the jury returned its verdict of guilty to both counts. Following the jury verdict, Judge Ritter adjudged Mr. Hoopes guilty as charged in Counts One and Two of the information, and on the 9th day of March, 1976, the Court ordered Hoopes committed to a term of imprisonment for a period of one year on each count, said sentence to run consecutively, for a total of two years, and in addition thereto, that Hoopes be fined in the sum of Ten Thousand Dollars as to each of the two counts, for a total fine in the sum of Twenty Thousand Dollars. Thereupon, Appellant filed his Notice of Appeal to the Tenth Circuit Court on the 15th day of March, 1976.

STATEMENT OF FACTS

Defendant-Appellant, Thomas Warner Hoopes, married, the father of eight, has engaged in the practice of dentistry in Salt Lake City, Utah, for the past fourteen years. Utilizing the "bank deposits method", it was established by the government's witnesses, that for the years 1971 and 1972, Hoopes received as income from his dent-

al practice an approximate "gross income", absent appropriate deductions, $44,324.66 and $41,503.38 respectively (T.72). The government's evidence further demonstrated that for the preceeding years of 1968, 1969, and 1970, Hoopes had duly and regularly filed federal income tax returns and had paid the taxes thereon in regular form. For the years 1971 and 1972, however, Hoopes filed forms 1040 containing his name, address, and other pertinent data, but withholding income information or figures which would be used in ascertaining the tax, invoking the Fifth Amendment in those specific instances. (T.8,11). Subsequently, The Defendant filed with the Internal Revenue Service on forms 1040, "amended returns" annexing thereto some 490 pages of documents and court decisions (Sullivan, Garner, et al) supporting claims made by the Defendant against revealing pertinent financial data (T.96). Notwithstanding, the government introduced evidence to the effect that Defendant during the years in issue regularly withheld taxes on wages paid to to his employees and furnished themwith form W-2 withholding statements. Further, when interviewed by agents of the Intelligence Division of the Internal Revenue Service during July of 1972, Hoopes indicated that he had made a study of the the Internal Revenue Code and the U.S. Constitution, and that by his invoking the Fifth Amendment was exercising a constitutionally protected right. (T.57,58,59).

Following the government's case-in-chief; the Defendant called several witnesses who testified as to his general reputation in the community for good character, and further, Hoopes took the stand and acknowledged his responsibility to make payment of all taxes and obey the law (T.85), but indicated that he was endeavoring to assert his right (Fifth Amendment) and privilege in a good faith manner, and have it ruled upon as to its validity (T.98). Hoopes indicated in his testimony,

that prior ot taking such action and following a complete disclosure of his plans that he had consulted with a number of persons whom he believed to be attorneys and learned in the law and holding themselves out as such, and that following such consultations, came to the belief that such action was legitimate, and that a tax return filed in such form would require the Internal Revenue Service to seek a judicial review and determination of the validity of the Fifth Amendment invocation.

The Internal Revenue Service, however, has totally ignored the Defendant's position, and assertion of his Fifth Amendment privilege, and has instead mistakenly brought criminal charges. No judicial or administrative hearing has ever been held to evaluate the validity of the Defendant's claim.

The Trial Court has repeatedly demonstrated an arbitrary, vindictive and prejudicial stance toward the Defendant before, during and subsequent to the trial.

David Knowlton, counsel for the Defendant, acted negligently, and systematically failed to obey Hoopes 's instructions and present the Defendant's actual defense, and was therefore, on the 11th day of December , 1976 released from further obligation to act as counsel to the Defendant.

Knowlton, having been "fired", then on his own, and absolutely contrary to Hoopes's instructions, filed a Motion for Reduction of Sentence. Hoopes, when notified of the scheduled hearing, ordered Knowlton (December 15, 1976) to immediately withdraw said motion. Knowlton failed to do so until eleven days after the erroneous and untimely Hearing was held! Hoopes had been explicitly assured that the Petition would be withdrawn by the personal appearance of the attorney prior to the scheduled Hearing on the 17th day of December, 1976.

Judge Ritter used the "non-Hearing" as an excuse to strike out at Hoopes once again! The transcript reads as follows:

> "MR. SNOW: Apparently Defendant Hoopes is not present but this was his motion to have the sentence reduced.
>
> THE COURT: Well, the motion is denied. It wouldn't make any difference if he had the whole bar representing him on that. I am not going to reduce that sentence." (T.1,2).

The Defendant, without counsel, filed a timely affidavit and Petition for Rehearing on the 16th day of December, 1976. Succinct arguments, revolving primarily around Sullivan and Garner, were presented to insure the inclusion in the record. The Petition was denied, February 3, 1977, without acknowledgment of Defendant's rights and Garner, Sullivan, or anyone else!

REASONS FOR GRANTING THE WRIT

POINT I

THE COURT BELOW IGNORED THE FIFTH AMENDMENT, SULLIVAN, GARNER AND HAS THEREBY DENIED TO PETITIONER ALL OF HIS RIGHTS THEREUNDER.

A, B, C, and D.

Since the Defendant timely filed his tax forms (1040) each year (T.6,8,10–12), the pivotal point in this case is the Defendant's intent (i.e. Whether or not there was "wilfulness"). The Defendant, believing that some of the questions called for answers that could be used in criminal charges against him, made specific objections to those specific questions. The forms were filled out in a strict compliance with long standing, and recently reiterated, U.S.Supreme Court rulings! In Garner v. United States, U.S.Supreme Court, No.74-100, Argued Nov.4,1975--Decided Mar. 23, 1976, Slip opinion. Also, Official Reports of Supreme Court, Vol. 424 U.S.,part 3, p. 600-873; 950-979. In their unanimous opinion the Supreme Court reaffirms the following cases: United States v.Sullivan, 274 U.S. 259 (1927), Kastigar v. United States, 406 U.S. 441 (1972), Boyd v. United States, [116 U.S. 616 (1886)], United States v. Kordel, 397 U.S. 1, 7-10 (1970), Miranda v. Arizona, 384 U.S. 436 (1966), Albertson v. SACB, 382 U.S. 70, 78-79 (1965), Vajtauer v. Commissioner of Immigration, 273 U.S., at 113 United States v. Murdock (Murdock I), 284 U.S. 141 (1931) United States v. Murdock (Murdock II), 290 U.S. 389 (1933), Tehan v. Shott,382 U.S. 406,415 (1966), Maness v. Meyers,419 U.S., 449, 460-461, 466 (1975).

The manner in which Defendant filed was absolutely consistent with U.S. v. Sullivan and was intended to assert Fifth Amendment privilege against specific disclosures sought on the returns. Defendant felt some of the questions could lead to criminal charges, and therefore was faced with the decision to either assert lawful privilege at the prescribed time, or waive it forever. In retrospect the claim of privilege can be outlined as follows:

1) Specific objections were made to specific questions as per Sullivan, supra.

2) A claim of "Fifth Amendment" privilege was made on each specific objection.

3) Defendant's desire to test specific questions was never passes upon by any judicial or administrative tribunal! This oversight is in direct contempt of the Supreme Court's rulings in Garner (Reaffirming Marchetti and Grosso):

> "As we have noted, the privilege is an exception to the general principle that the Government has the right to everyone's testimony. A corollary to that principle is that the claim of privilege ordinarily must be presented to a 'tribunal' for evaluation at the time disclosures are initially sought."

Further in Garner:

> "If the latter claims the protection of the Fifth Amendment, he receives a judicial ruling at that time on the validity of his claim, and he has an opportunity to reconsider it before being held in contempt for refusal to answer." Cf. Maness v. Meyers, 419 U.S., at 460-461. (Emphasis supplied).

Again in Garner, dealing with the good-faith assertion of the privilege:

> "It would be quite another to deny a good-faith defense to someone like petitioner, who may be denied a ruling on the validity of his claim of privilege until his criminal prosecution, when it is too late to reconsider. If, contrary to the undisputed fact, a taxpayer had no assurance of either a preliminary ruling or a defense of good-faith assertion of the privilege, he could claim the privilege only at the risk that an erroneous assessment of the law of self-incrimination would subject him to criminal liability. In that event I would consider the taxpayer to have been denied the free choice to claim the privilege, and would view any incriminating disclosures on his tax return as "compelled" within the meaning of the Fifth Amendment. Only because a good-faith erroneous claim of privilege entitles a taxpayer to acquittal under 7203 can I conclude that petitioner's disclosures are admissible against him. (Emphasis supplied). Id. at 3 (Con.)

The Defendant was a "witness" on the tax return; a witness must object or lose the privilege! Garner, supra, clearly points out:

> "The term "witness" is used herein to identify one who, at the time disclosures are sought from him, is not a defendant in a criminal proceeding. The more frequent situations in which a witness' disclosures are compelled, subject to Fifth Amendment rights, include testimony before a grand jury, in a civil or criminal case or proceeding, or before a legislative or administrative body possessing subpoena power. Id. at 5 (footnote). (Emphasis supplied).

Again in Garner, it is indicated how narrow and limited an appropriate time for asserting the privilege actually is:

> "The Court has held that an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege. Id. at 6. (Emphasis supplied)

Also:

> "The Court also has held, analogously, that a witness loses the privilege by failing to claim it promptly even though the information being sought remains undisclosed when the privilege is claimed. Id. at 5 (Emphasis supplied)

Strengthening the application of the "privilege", Garner reaffirms Monia as follows:

> "If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." United States v. Monia, supra, at 427 (Footnote omitted). Id at 7 (Emphasis supplied).

Again in Garner:

> "Unless a witness objects a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. . . the burden approprately lies with him to make a timely assertion of the privilege. In addition, the rule that a witness must claim the privilege is consistent with the the fundamental purpose of the Fifth Amendment--the preservation of an adversary system of criminal justice. Id. at 7, 8. (Emphasis supplied).

Only the "witness" knows if a disclosure may incriminate him:

> "Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. Id. at 8 (Emphasis supplied).

The filer of an income tax return is a "witness":

> "The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a "witness", as that term is used herein. Id. at 8. (Emphasis supplied).

The 7203 "Wilful Failure To File" charge is absolutely erroneous! Conviction cannot be based on a valid exercise of the Fifth Amendment privilege. A Defendant's right against self incrimination entitles him to remain silent unless he chooses to speak in the unfettered exercise of his own free will and to suffer no penalty for such silence. Brooks v. Tennessee, 406 U.S. 605., Mallory v. Hogan, 378 U.S. 1. Garner unequivocally states the thrust of the Defendant's position--an argument the I.R.S. cannot bring itself to address:

> "A 7203 conviction cannot be based on a valid exercise of the privilege. This is implicit in the dictum of United States v. Sullivan, supra, that the privilege may be claimed on a return. Id. at 14. (Emphasis supplied).

Firming that stand, Garner goes on:

> "The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a

> valid and timely claim of privilege, a protection broadened by 7203's statutory standard of "willfulness." Id. at 15. (Emphasis supplied).

Conviction is not proper even if claim of privilege is erroneous, if in good faith:

> "Because 7203 proscribes "willful" failures to make returns, a taxpayer is not at peril for every erroneous claim of privilege. The Government recognizes that a Defendant could not properly be convicted for an erroneous claim of privilege asserted in good faith. . . . . But the Court recognized that "good faith" in its assertion would entitle Murdock to acquittal. Id. at 15. (Emphasis supplied).

Similarly, those judges concurring:

> "Since a good-faith erroneous assertion of the privilege does not expose a taxpayer to criminal liability, ... The protection accorded a good-faith assertion of the privilege effectively preserves the taxpayer's freedom to choose between making incriminating disclosures and claiming his Fifth Amendment privilege. Id. at 1, 2. (Concur.) (Emphasis supplied).

A valid claim of privilege is a defense to a 7203 prosecution:

> It is constitutionally sufficient, according to the Court, that a valid claim of privilege is a defense to a 7203 prosecution. Id. at 2 (Concur.) (Emphasis supplied).

A good-faith assertion entitles the Defendant to acquittal!

> "Indeed, as the Court notes, ante, at 15, n. 18, the Court held that Murdock was entitled to acauittal if his assertion of the privilege was in good faith. Unit-

ed States v. Murdock (Murdock II), 290 U.S. 389 (1933). Id. at 2 (Concur.) (Emphasis supplied).

Additionally:

> "Only because a good-faith erroneous claim of privilege entitles a taxpayer to acquittal under 7203. . . Id. at 3 (Concur.) (Emphasis supplied)

A careful examination of the evidence, the Defendant's defense, and the record make clear the following points:

1. The Internal Revenue Service has made absolutely NO EFFORT TO COMPLY WITH THE SUPREME COURT'S DICTUM IN GARNER!

2. The Trial Court supported the Government to the extent that he refused to instruct the jury with respect to the Defense's Instructions! He misled the jury by giving them the wrong definition of "Wilfulness"! JUDGE RITTER HAS TOTALLY IGNORED THE SUPREME COURT'S DICTUM IN GARNER!

3. The Appellate Court has blindly (?) supported the Trial Court, disregarded the familiar reversible errors, and TOTALLY IGNORED THE SUPREME COURT'S DICTUM IN GARNER!

POINT II

THE TRIAL COURT HAS A MASSIVE PERSONAL PREJUDICE AND BIAS AGAINST THE DEFENDANT THAT PREVENTS HIM FROM MAKING OBJECTIVE, JUST DECISIONS.

The Defendant had previously signed a petition to have

Trial Court, Judge Willis W. Ritter, impeached, and he knew of this fact! The majority of the attorneys in this judicial district want Judge Ritter removed from office, but are fearful of allowing their names to be recorded, and therefore answer the Bar Association's Polls anonymously.

The Defendant has also openly supported legislation to have Judge Ritter stripped of his power a "Chief" Judge, and he also knew of this fact!

The Defendant had earlier filed a suit in Federal Court, to which Judge Ritter was a party, and he knew of this fact! He later heard and dismissed this suit, to which he was a party!

Judge Ritter has categorized the Defendant as a tax protestor, even though the Defendant neither was, nor is a member of any organization or group so involved. The Defendant is simply an individual citizen wishing to exercise his constitutionally protected rights LONG UPHELD BY THIS COURT!

The Defendant filed two motions for Disqualification. Both were summarily denied by Judge Ritter.

A Motion for a Writ of Mandamus was filed with the Tenth Circuit Court; However, Judge Ritter held the trial against the Defendant, immediately after denying the disqualification motions, and prior to receiving the ruling from the Circuit Court on the Mandamus.

Judge Ritter imposed the Absolute MAXIMUM PENALTY for these erroneous charges (i.e. Two years [consecutively] and twenty thousand dollars in fines!) The probation officer and the prosecuting attorney lied and grossly exaggerated values of income and home to insure the suppression

of ANY dissent, ANY opposition to corruption! This is a curious way to treat a citizen who is simply exercising his right to the Fifth Amendment privilege!

Judge Ritter ruled in a Motion to Reduce Sentence, the same supposedly having been withdrawn, the same entered by the attorney after having been fired! Remember the quote (on page 7 of this petition) reads a follows:

> THE COURT: Well, the motion is denied. It wouldn't make any difference if he had the whole bar representing him on that. I am not going to reduce that sentence." (T. 1,2).

This Honorable Court can see unmistakenly that there NO circumstances, no evidence sufficiently weighty to alter Judge Ritter's prejudiced mind to mitigate the harsh sentence! How can he objectively rule when he says such as quoted above? There should be no place for such subjectivity as Judge Ritter is demonstrating ON THE RECORD. His bias, which is repeatedly surfacing, is massive, and unyielding, and makes him unfit to rule in Defendant's case. HE IS USING THE POWERS OF THE COURT, UNDER COLOR OF LAW, TO SUPPRESS HIS PERSONAL ENEMIES AND CARRY OUT HIS VENDETTA!

POINT III

> DEFENDANT'S COUNSEL HAS, THROUGH INEPTITUDE, NEGLIGENCE, AND WANTON DISREGARD, MISREPRESENTED HIS CLIENT'S CASE.

Please refer to the Petition for Rehearing, submitted by the Defendant Pro se, for Affidavit, and extensive details substantiating the above charge. Also Appendix A-2.

Recourse is necessary to this Court by Certiorari for relief because the Tenth Circuit Court of Appeals has denied to petitioner his Federal rights.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari be granted. The Decision below is not in accord with applicable Decisions of this Court, Garner, Sullivan. Kastigar, Mallory and Monia.

Respectfully submitted,

THOMAS W. HOOPES
2559 Keddington Lane
Salt Lake City, Utah 84117
Petitioner Pro se

CERTIFICATE OF MAILING

A copy of the foregoing Petition was posted in the U. S. mail postage prepaid and addressed to the Assistant United States Attorney, Rodney G. Snow, Esq., 200 U.S. Post Office and Courthouse, Salt Lake City, Utah, 84101, on the 4th day of March, 1977.

Thomas W. Hoopes
Thomas W. Hoopes

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1197

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS WARNER HOOPES, Defendant-Appellant.	Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. Cr-75-79)

Submitted on Briefs.

Ramon M. Child, United States Attorney, and Rodney G. Snow, Assistant United States Attorney, Salt Lake City, Utah, for Plaintiff-Appellee.

David J. Knowlton, Ogden, Utah for Defendant-Appellant.

Before PICKETT, HILL and McWILLIAMS, Circuit Judges.

PICKETT, Circuit Judge.

EXCERPT, Page 2, Paragraph 1:

"On appeal it is urged only that the trial court erred in refusing to instruct the jury on the theory of defense, which was that Hoopes had failed to file his 1971 and 1972 income tax returns relying in good faith upon the advice of attorneys. (Emphasis supplied)

APPENDICES

In the

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THOMAS WARNER HOOPES,

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THOMAS W. HOOPES
2559 Keddington Lane
Salt Lake City, Utah 84117
Petitioner Pro se

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APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1197

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THOMAS WARNER HOOPES, Defendant-Appellant	FILED Dec. 3, 1976 Howard K. Phillips, Clerk Appeal from the United States District Court for the District of Utah, Central Division (D.C. No. Cr-75-79)

Submitted on briefs.

Ramon M. Child, United States Attorney, and Rodney G. Snow, Assistant United States Attorney, Salt Lake City, Utah for Plaintiff-Appellee.

David J. Knowlton, Ogden, Utah, for Defendant-Appellant.

Before PICKETT, HILL and McWILLIAMS, Circuit Judges.

PICKETT, Circuit Judge.

Appellant Hoopes was accused in a two count Information of violating 26 U.S.C. §7203 by failing to file federal income tax returns for the years 1971 and 1972. Following

a jury conviction he was sentenced on each count to imprisonment for a period of one year and to pay a fine of $10,000, the sentences to run consecutively. On appeal it is urged only that the trial court erred in refusing to instruct the jury on the theory of defense, which was that Hoopes had failed to file his 1971 and 1972 income tax returns relying in good faith upon the advice of attorneys.

The law is settled that in criminal cases a defendant is entitled to adequate instructions to the jury on his theory of defense, provided there is evidence to reasonably support the theory. Speers v. United States, 387 F.2d 698 (10th Cir.), cert. denied, 391 U.S. 956 (1967); Beck v. United States, 305 F.2d 595 (10th Cir.), cert. denied, 371 U.S. 890 (1962). We are satisfied in this case that the evidence is not such as to reasonably support the theory that Hoopes, in failing to file his 1971 and 1972 income tax returns, was in good faith relying upon the advice of attorneys. A fair analysis of the evidence is that Hoopes, after years of concern, agitation, and study of the federal income tax laws and other governmental fiscal activities, decided on his own the course of action he would take, as he in effect testified, to bring the matter to a head. His conduct was an open defiance of the law and his claim that he acted in good faith upon advice of attorneys was obviously an afterthought.

For a number of years Hoopes had been a practicing dentist in Salt Lake City, Utah, with substantial yearly income. During those years he had become disenchanted with the fiscal policies of the United States and was very critical of the income tax law and procedures of the Internal Revenue Service. He discussed those matters with many people and accumulated and read a mass of literature on the subjects. For the years 1968, 1969, and 1970 he filed Form 1040 income tax returns with the assistance of an accountant and paid the taxes due under protest. No civil litigation resulted from those protests. For the year 1971 Hoopes adopted a

new course of action by filing a 1040 income tax form containing only his name and address. Across the form was written, "UNDER PROTEST I PLEAD THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION; ALSO ARTICLE 1-SEC. 8, 10, THE FIRST, FOURTH, SEVENTH, TENTH AND FOURTEENTH AMENDMENTS TO SAME." The identical procedure was followed in 1972 when a 1040 from was filed, with some variation in the writing across the face of the form.[1] Regarding his reason for filing the 1040 form without any information concerning his income, Hoopes testified:

> I simply wanted to register a protest and get the Internal Revenue Service to face me in civil litigation whereby we could resolve some type of a disagreement. I felt they were transgressing upon the citizens' rights.

A special agent of the Internal Revenue Service interviewed Hoopes with reference to his 1971 return. The result of the interview was mostly a dissertation by Hoopes on his constitutional rights and ideological beliefs. He refused to allow the agent access to his records for the purpose of determining his income, stating that the refusal was the result of his belief that under the Constitution he was not required to divulge that information.[2] During the interview Hoopes did

---

[1] In a similar case, United States v. Porth, 426 F.2d 519, 523 (10 Cir.), cert. denied, 400 U.S. 824 (1970), we held:

> . . . A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner. . . .

not claim that he was relying on the advice of an attorney when he filed the 1971 income tax return in blank. The Internal Revenue Service determined the income by other means and it is not contended that tax returns were not due for the years 1971 and 1972.

---

[2]With reference to this interview, the agent testified as follows:

> A. But I explained the penalty, then I further explained the penalties for not filing a tax return.
>
> Q. What did Dr. Hoopes state to you?
>
> A. Again he stated he was well aware of the law and that he had filed the letter with the Internal Revenue Service and he referred to it as a letter and that was all he was going to file.
>
> Q. Did he state anything to you why he wasn't going to file or why he only filed the letter?
>
> A. We went into a long discussion with regards to the Constitution and his belief on the Constitution that the Internal Revenue Code was in violation of the Constitution and that any law in violation of the Constitution did now have to be obeyed.
>
> Q. What did you explain to him in that regard?
>
> A. Well, as I said, we discussed for some time on this and I told him that I wasn't there to discuss or argue ideologies necessarily but that I was assigned to the investigation to investigate his tax return. I attempted to get access to his records so that we could file a correct tax return and these were denied me.

With reference to his consultation with attorneys on his tax matters, Hoopes testified that he discussed the matter with three lawyers, Robert Matheson of Salt Lake City, Utah and William Drexler and Jerome Daly, both of Minnesota. Of these, only Mr. Matheson was a practicing attorney. He advised Hoopes that his plan of action "was a precarious course to follow . . . . because there were many cases operating against that." Hoopes said he attended three lectures given by Drexler in 1972, 1973, and 1974 on the subject of the federal income tax. In addition to listening to the lectures, Hoopes discussed the tax matter with him on several occasions. At least two of these meetings were after Hoopes had decided on his course of action. Apparently Drexler advised him that his course of action was "proper." As to Jerome Daly, Hoopes attended one lecture given by him in May of 1972 in which Daly discussed a court case he had won in Minnesota concerning the value of the dollar. Hoopes did not recall that Daly had mentioned income tax.

Over the years Hoopes had accumulated a mass of literature, court decisions, and other material which he thought supported his ideologies. He introduced in evidence 490 pages of that printed material, most of which was irrelevant to the issues of the case. It did, however, contain publications which disclosed that Drexler and Daly were tax protestors who had been disbarred from the practice of law in Minnesota. Each had been prosecuted for the same offense for which Hoopes was being tried. Drexler was acquitted, and Daly was convicted and his conviction affirmed. United States v. Daly, 481 F.2d 28 (8th Cir.), cert. denied, 414 U.S. 1064 (1973). In concluding his testimony, Hoopes stated that he now recognized that he might have made a "serious mistake" in following the course he did.

Hoopes knew, as do millions of other American citizens, that the law required him to file income tax returns. The law books are replete with criminal cases involving the wil-

lful failure to file federal income tax returns. Years ago, the Supreme Court, after recognizing the rule that it is a defense in a criminal action if the accused honestly and in good faith acted on advice of a lawyer, stated: "But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel." Williamson v. United States, 207 U.S. 425, 453 (1908). In an analogous situation, the Fourth Circuit use substantially the same language. See United States v. Painter, 314 F.2d 939, 943, cert. denied, 374 U.S. 831 (1963). Furthermore, one of the essential elements of the offense charged is wilfulness on the part of the accused. In defining wilfulness, the court instructed the jury as follows:

> The specific intent of wilfulness -- I must tell you about that -- the specific intent of wilfulness is an essential element of the crime for failure to file an income tax return. The word "wilful" as used in this statute means voluntarily, purposefully, deliberately and intentionally as distinguished from accidental, inadvertent or negligent. Mere negligence, even gross negligence, is not sufficient to constitute wilfulness. You will note that the failure to act as charged in the two Counts of the Information is alleged to have been wilful. A failure to act is wilful if voluntary and purposeful and with the specific intent to fail to do what the law requires to be done, that is to say, with the bad purpose to disobey or disregard the law. I charge you that the only bad purpose necessary for the government to prove in this case is the deliberate intention not to file tax returns, which the defendant knew he was required to file, at the time he was required by law to file them.

Compare United States v. Pomponio, ___ U.S.___ (Octo-

The court also fully instructed the jury on the necessity of proving intent. Considering the instructions as a whole, the question of good faith was adequately included and there was no prejudicial error in the failure of the court to give a separate instruction on the subject. Speers v. United States, supra; Beck v. United States, supra. See also United States v. Stone, 431 F.2d 1286 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971); New England Enterprises, Inc. v. United States, 400 F.2d 58 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969).

AFFIRMED.

JANUARY TERM - February 3, 1977

Before The Honorable David T. Lewis, Chief Judge,
The Honorable John C. Pickett, Senior Circuit Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
vs.) No. 76-1197
)
THOMAS WARNER HOOPES,)
Defendant-Appellant.)

This matter comes on for consideration of the appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Pickett, Hill and McWilliams to whom the case was submitted.

The petition for rehearing having been denied by the original panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk
By Robert L. Hoecker
Chief Deputy Clerk

AFFIDAVIT
IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

STATE OF UTAH
SS No. 76-1271
COUNTY OF SALT LAKE

Having been first duly sworn, Thomas W. Hoopes, deposes and states as follows:

1. I am the Defendant-Petitioner in the above entitled proceeding.

2. Prior to, and during the trial in the lower court, prior to the appeal and submission of the appeal brief, prior to the judgment in the appeals court, I instructed, I demanded my attorney, David Knowlton, include arguments that most accurately represented my intent and defense (Garner v. U.S. 96 S. Ct. 1178 (1976), United States v. Sullivan, 274 U.S. 259 (1927), et al) to the charge.

3. Never once did he argue my case properly, neither did he follow my instruction as to the true facts, nor challenge the witnesses whose testimony was not correct -- he doggedly pursued his own pet theory of defense!

4. Because of these violations of our agreement entered into for him to represent me in this case (76-1179), I severed the relationship, effective December 11, 1976.

5. Following this severance, as witnessed by an individual who accompanied me, Knowlton, contrary to my instruction, filed for a hearing to reduce the sentence. I reaffirmed the severance on December 15th, when I demanded that he withdraw his unauthorized motion. He assured me that he would appear personally to effect the withdrawal,

prior to the hearing -- he did not do so! He permitted the hearing to be called on December 17, 1976 without making an appearance. I did not appear because of his assurance that he would withdraw the motion.

Knowlton mailed his motion of withdrawal of counsel (Case No. 76-1197) to the circuit court on December 12, 1976. He filed his withdrawal of motion to reduce sentence and the notice of withdrawal of counsel on December 28, 1976 -- ELEVEN DAYS AFTER THE HEARING! This was just the excuse Judge Ritter needed to prejudicially strike out at me once again! (See the quote in the petition).

6. The IRS is wholly inconsistent with, and contradictory to the U.S. Supreme Court's decisions! The agent, Tim Elison, read the Miranda warning to me when he began his "investigation" -- but then proceeded to disregard the fact that I asserted the 5th Amendment privilege. The IRS proceeded to charge me with "wilful failure to file" (26 U.S.C. § 7203) WITHOUT ANY HEARINGS BEFORE A TRIBUNAL FOR A RULING ON THE VALIDITY OF MY ASSERTION!

7. Everyone is presumed to know the law. However, I notified the IRS of the application of Sullivan and Garner to my assertion and they are without excuse for not seeking a tribunal's decision.

8. The IRS has overstepped its legal bounds and is creating its own empire, acting as its own judge, even though it is part of the Executive branch of government and can in no way rightfully exercise a power of the Judiciary.

9. If the IRS is permitted to maintain this perverted charge the Supreme Court will cease to be "supreme".

10. The trial court, Judge Willis W. Ritter, while a

party to an action brought by the defendant in the Federal Court, did sit and rule in his own behalf! (C 76-3).

11. The trial court refused to read the defendant's instructions in charging the jury, manipulated the jury by telling them the defendant was guilty of wilfulness, precluding an acquittal!

12. Judge Ritter, who is overturned by the Tenth Circuit approximately eighty-percent of the time, even deleted one portion of the prosecution's instructions to the jury that would have permitted the jury to see the possibility that the defendant was justified in his actions. He also withheld the proper definition of "wilfulness", and any mention of Garner and Sullivan defense!

13. I informed the Tenth Circuit Court of these facts in an affidavit submitted with my petition for rehearing. They totally ignored this miscarriage and sumarily denied the rehearing without comment or opinion!

14. I find myself in a position that, having followed the dictum of the highest Court in the land, I am being punished by the IRS for so doing. This is all out of joint! The IRS's dispute is clearly with the Supreme Court -- I am forced to be the "whipping boy" in this dispute!

15. During this degrading process I have been doubly punished with rapidly deteriorating health. I have rapidly worsening Diabites Mellitus, have become totally blind in one eye, am rapidly losing the sight in the other eye, am further afflicted with spinal arthritis and osteitis, with frequent chronic severe headaches and nausea requiring cervical traction, continuous severe chronic allergic rhinitis.

16. Adverse publicity, deliberately distorted by the IRS, has so impaired my practice that, contrary to the lies

of the prosecutor and probation officers, I am unable to adequately support my wife and children (8). I have no property, I own neither house (or equity in a house), nor do I own any automobiles. I have been drained financially to the point that I am in serious straits, without future potential to satisfy my creditors, let alone pay twenty thousand dollars in fines! By the prosecutor's and probation officer's wild exaggerations, outright lies, overestimations, the trial court was led to believe that I was capable of paying the exhorbitant fines imposed. NOTHING COULD BE FURTHER FROM THE TRUTH! I have been reduced, by protracted legal defense costs and adverse publicity, to a virtual pauper -- all for obeying the Supreme Court's dictum!

17. The lower courts have behaved in an arrogant, self-sufficient, tyrranical way, turning their backs upon the clear, unambiguous statement of this Honorable Court in regard to a good-faith, timely, assertion of the Constitutionally protected right against self incrimination.

18. I desire to resume filing of income tax forms, but am trapped in the corner with erroneous legal charges, afraid that some of the information they demand may be used to incriminate me. I humbly pray that this august body will seriously consider this crude petition for certiorari and, in mercy, aware of the horrendous legal injustices inflicted thus-far, dismiss the erroneous two charges against the defendant, or, at the very least, remand the case back to an unbiased court for proper retrial.

Respectfully submitted,

Dated May 2, 1977

Thomas W. Hoopes

Thomas W. Hoopes, Pro se

Subscribed and sworn to before me this 2 day of May, 1977

Notary Public

My Commission Expires:

CERTIFICATE OF MAILING

A copy of the foregoing Appendices, to be adjoined to the previously docketed Petition for a Writ of Certiorari, was posted in the U.S. Mail, postage prepaid, and addressed to the Assistant United States Attorney, Rodney G. Snow, Esq., 200 U.S. Post Office and Courthouse, Salt Lake City, Utah, 84101; also the Solicitor General, Washington, D.C. on the 6th day of May, 1977.

Thomas W. Hoopes

Supreme Court, U. S.
FILED
MAY 19 1977
MICHAEL RODAK, JR., CLERK

No. 76-1271

In the Supreme Court of the United States

OCTOBER TERM, 1976

THOMAS WARNER HOOPES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that the Fifth Amendment bars his conviction for failure to file tax returns, that he did not receive adequate assistance of counsel, and that the trial judge should have recused himself.

Petitioner is a dentist and had approximate incomes of $44,324 and $41,503 in 1971 and 1972, respectively (II-R. 19, 31-32, 72).[1] For both years he filed Forms 1040 containing only his name and address. Across each form was written, "under protest I plead the Fifth Amendment to the U.S. Constitution; also Article I-Sec. 8, 10, the First, Fourth,

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[1]The record in this Court consists of four volumes: "I-R." designates the pretrial proceedings. "II-R." designates the trial transcript. "III-R." designates the clerk's transcript (pleadings). "Supp. R." designates the proceedings in the court of appeals.

Seventh, Tenth and Fourteenth Amendments to same" (Pet. App. B, p. B-3).

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted on two counts of willfully failing to file income tax returns for 1971 and 1972, in violation of 26 U.S.C. 7203. The court sentenced him to two consecutive prison terms of one year and fined him $10,000 on each count (III-R. 61). The court of appeals affirmed (Pet. App. B, pp. B-1 to B-7).

1. Petitioner argues (Pet. 8-14) that his conviction is barred by the Fifth Amendment and this Court's decisions in *United States* v. *Sullivan*, 274 U.S. 259, and *Garner* v. *United States*, 424 U.S. 648. But the Fifth Amendment does not protect a person against criminal liability for refusing to disclose the amount of his income on a tax return. In *United States* v. *Sullivan, supra*, the Court rejected a bootlegger's claim that the Fifth Amendment supported his failure to file a tax return, stating that "[i]t would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime" (274 U.S. at 263-264). While the Court suggested in *Sullivan* that the privilege against self-incrimination might in some circumstances justify a refusal to answer specific questions on a return, it held that a person "could not on that account refuse to make any return at all" (*id.* at 263). Here, petitioner has made no return at all because the Forms 1040 that he filed gave no information from which his tax liability could be computed. See, *e.g.*, *United States* v. *Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824. Petitioner therefore was properly convicted for failure to file a return under the standard of *Sullivan*.

Nor does *Garner* v. *United States, supra*, support petitioner. In that case, the defendant's income tax returns, in which he stated he was a gambler, were introduced into evidence as proof of the federal gambling offense with which he was charged. In rejecting the argument that the admission of such evidence violated the defendant's privilege against compulsory self-incrimination, the Court reasoned that he could have refused to answer the question on the tax return as to his occupation and therefore the disclosure on his return had not been "compelled" within the meaning of the Fifth Amendment (see 424 U.S. at 649-653, 662). Thus *Garner*, like *Sullivan*, recognizes that a taxpayer may properly invoke his privilege as to specific questions on a return, but neither decision allows a taxpayer to invoke the privilege as a basis for a wholesale refusal to report income.

2. Petitioner further argues (Pet. 14-16) that the trial judge should have recused himself, asserting that the judge knew that petitioner had signed a petition asking that the judge be impeached, that petitioner had openly supported legislation to have the judge stripped of his power as chief judge, and that petitioner had earlier filed a suit in federal court in which the judge was named as an adverse party, and also that the judge had characterized petitioner as a tax protestor. But petitioner's single motion for disqualification filed in the trial court (see III-R. 5-26) did not allege any of these facts. Petitioner can hardly be heard to argue that the trial judge erred in refusing to disqualify himself on the basis of allegations not made in the motion for disqualification. Moreover, petitioner did not raise this question in the court of appeals and therefore it is not appropriately presented here. *Lawn* v. *United States*, 355 U.S. 339.

At all events, even if petitioner's present allegations are true, the facts that the trial judge knew that petitioner had previously signed a petition to have the judge impeached,

that petitioner had supported legislation to have the judge removed as chief judge, and that petitioner had filed a suit in federal court in which the judge was named as an adverse party[2] would not have required the trial judge to recuse himself. *United States* v. *Bray*, 546 F. 2d 851, 858 (C.A. 10); *United States* v. *Garrison*, 340 F. Supp. 952, 956-957 (E.D. La.). Indeed, if the rule were otherwise, every criminal defendant would be able to disqualify any and all judges assigned to try his case simply by, for example, making derogatory remarks about the judge in public and filing frivolous suits against him. See *United States* v. *Fujimoto*, 101 F. Supp. 293, 296 (D. Hawaii), motion for leave to file petition for writ of prohibition or mandamus denied *sub nom. Fujimoto* v. *Wiig*, 344 U.S. 852.

3. Finally, petitioner contends (Pet. 16) that his attorney did not provide him with effective assistance. But petitioner did not complain about the assistance of his counsel, who served in both the district court and the court of appeals, until his petition for rehearing in the court of appeals. In that document (Supp. R. 8), petitioner criticized counsel's failure to rely on this Court's *Sullivan* and *Garner* decisions, and petitioner incorporates that claim by reference here (see Pet. 16). But since neither of these decisions support petitioner's Fifth Amendment claim (see pp. 2-3, *supra*), there is no basis for his argument that his attorney's failure to rely upon them deprived petitioner of the effective assistance of counsel.

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[2]Petitioner did file a suit in the federal district court, naming the trial judge as one of the defendants. See *Hoopes, et al.* v. *Ritter, et al.*, C.A. 10, No. 76-1721, decided February 11, 1977.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.